IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KONECRANES, INC., Plaintiff, v. BRIAN SCOTT DAVIS and INDUSTRIAL & CRANE SERVICES, INC., Defendants.	))))))))))	Case Number 1:12-cv-01700-JMS-MJD

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Come now Defendants, Brian Scott Davis ("Davis") and Industrial & Crane Services, Inc. ("ICS"), by counsel and submit this Reply Memorandum in Support of their Motion for Summary Judgment [Doc. 73].

I. INTRODUCTION

In its response to Defendants' Motion for Summary Judgment, Plaintiff, Konecranes, Inc. ("Konecranes"), devotes substantial effort to creating issues of fact that are not material to Konecranes' claims against Defendants and (accordingly) have no bearing on the pending Motion. When the Court examines the material facts, Defendants' Motion for Summary Judgment should be granted, for two (2) primary reasons. First, there can be no dispute that ICS was the source of, and already knew, the "Confidential Information" that Davis allegedly disclosed to ICS in an alleged breach of the confidentiality provision in Davis' Employee Noncompetition and Confidentiality Agreement (the "Agreement"). Second, despite Konecranes' bald assertions to the contrary, there is no evidence that any unlawful conduct by Davis or ICS caused Konecranes to lose any work that Konecranes otherwise would have won and performed. For those reasons and others discussed herein, the Court should find that there is no genuine issue of material fact and grant full and final summary judgment to Davis and ICS.

II. ARGUMENT

A. Konecranes has failed to identify a genuine issue of material fact in support of its claim that Davis used "Confidential Information" in breach of the Agreement, and that Konecranes suffered damages as a result.

Davis and ICS moved for summary judgment on Konecranes' claim that Davis breached the confidentiality provisions of the Agreement on the basis that "[t]here is no evidence that [Davis] has disclosed any Confidential Information, or made use of any Confidential Information outside of his duties as a Konecranes employee." (Doc. 74, p. 8). In response, Konecranes contends that Davis breached the Agreement by telling ICS President Todd Williams how many man lifts, man hours, and other equipment ICS would need to complete work on cranes at Nucor Sheet Metal Group ("Nucor") known as the "7501 crane" and the "7502 crane." (Doc. 80, p. 1-2). Konecranes cites testimony of its employees, Andrew Groomes and Jason Villas, that as a Konecranes employee, Davis was involved with Konecranes' work on Nucor's "7500 crane" and the "7503 crane" at Nucor. As a result, Davis would generally know "about the maintenance and service methods and procedures, costs profits and pricing for this work," which (generally) would be considered Konecranes' Confidential Information relating to that project. Konecranes also contends that its Confidential Information included the number of "man lifts and man hours are needed for a particular project." (Doc. 80-4, Villas Aff., ¶ 34).[1] Konecranes further asserts that, because the work on the 7501 and 7502 cranes was "similar" to the work on the 7500

[1] While Groomes and Villas testify that Davis worked on the 7500 and 7503 projects and generally possessed information about the projects, they do not testify that Davis knew the number of man hours and man lifts that were used on those projects, and there is no other evidence suggesting that Davis knew those numbers for those projects.

and 7503 crane, the number of "man hours and man lifts" Davis shared with ICS in preparation for the bids on the 7501 and 7502 cranes necessarily included Konecranes' Confidential Information regarding its work on the 7503 crane. On that basis, Konecranes claims that Davis (in concert with ICS) breached the Agreement.

There are at least four (4) flaws with Konecranes' contention, each of which is fatal. First, Konecranes refers generally to the number of man hours and number of man lifts for the 7500 and 7503 cranes as constituting Konecranes' "Confidential Information." However, Konecranes does not identify what those figures were for the 7500 and 7503 cranes, or whether there is a formula or "rule of thumb" that Konecranes generally uses for determining those figures for a given project, and if so, what that formula or "rule of thumb" is. A plaintiff claiming breach of a confidentiality provision must do more than "offer[] general descriptions of the type of information it believes the Agreement made confidential." *Marine Travelift, Inc. v. Marine Lift Systems, Inc.*, 2003 WL 6255689, *5 (E.D. Wis. Dec. 4, 2013). Instead, a plaintiff must "specifically identify the [. . .] confidential information it claims [the defendant] disclosed." "Unless the plaintiff engages in a serious effort to pin down the secrets a court cannot do its job." *Marine Travelift,* 2003 WL 6255689, *6 (citing *IDX Sys. Corp. v. EPIC Sys. Corp.,* 285 F.3d 581, 583 (7th Cir. 2002)). Konecranes asks this Court to conclude that the number of man hours and man lifts needed to complete a project is sufficiently proprietary that it should be deemed "Confidential Information" under the Agreement, even though Konecranes has not stated what those numbers were for the 7500 and 7503 crane projects.

Second, Defendants suspect that the reason why Konecranes has not stated the number of man hours and man lifts that were needed for the 7500 and 7503 crane projects is that Konecranes likely does not know what those numbers are. (Doc. 82-1, Davis Aff.,¶ 5-6). The work with which Davis was involved on the 7500 and 7503 crane projects was performed exclusively by a subcontractor, who bid (and billed for) that project on a lump-sum basis. (Doc. 82-1, Davis Aff.,¶ 5). As a result, the subcontractor did not disclose to Konecranes the number of man-hours and man lifts that were estimated—or that were actually used—for that project. (Doc. 82-1, Davis Aff.,¶ 6). Accordingly, as a Konecranes employee, Davis did not know the number of man-hours or man lifts that the subcontractor estimated (or used) to complete the work on the 7500 and 7503 crane projects. (Doc. 82-1, Davis Aff.,¶ 6).

Third, even if there were competent evidence showing that Davis knew the number of man-hours and man lifts that were used on the 7500 and 7503 crane project (and there is none), Davis did not testify that he told ICS the number of man-hours and man lifts that were estimated or used on those two (2) projects. Davis testified:

> A. My job would be to look at how many manhours I would think or how much equipment we would need for the job as far as man lifts and manhours possibly. You know, do I need five guys or do I need ten guys.
>
> Q. And so that's what you mean when you use the words "scope of work"?
>
> A. Yes, sir.
>
> Q. And did you provide the information on manhours or man lift to Todd for the work on the 7502 crane?
>
> A. Yes. I probably told him how many man lifts we needed and a welder machine.
>
> Q. Did you provide Todd similar information on manhours and man lifts for the work on the Nucor 7501 crane?
>
> A. Yes. Lifts, yeah, equipment.

(Doc. 80-3, Davis Dep., p. 53, l. 10-25). (Emphasis added). As shown above, Davis told ICS the number of man-hours and man lifts that Davis thought would be required for the 7501 and 7502 crane projects, not the number of man-hours and man lifts that were estimated or used on the 7500 or 7503 crane projects.

Konecranes contends that, because the work on the 7501 and 7502 cranes was "similar" to the work that Davis was involved with on the 7503 crane while he was at Konecranes, Davis's thoughts about how many man-hours and man lifts were required for the 7501 and 7502 cranes were necessarily colored by what Davis (allegedly) learned about the number of man-hours and man lifts that were required for the 7500 and 7503 cranes. There are two (2) problems with that contention. One, Konecranes' assertion that the work on the three (3) cranes was "similar" is, at best, conclusory, and therefore incapable of creating an issue of fact. Two, Konecranes assumes that Davis's thoughts about the number of required man-hours and man lifts were based exclusively on information that Davis learned while employed at Konecranes. However, before Davis went to work for Konecranes, Davis had nine (9) years of experience maintaining equipment, which included crane maintenance. (Doc. 82-1, Davis Aff.,¶ 7). Davis worked for a competitor of Konecranes that provided maintenance services for cranes, and provided quotes for those services on a lump-sum basis. (Doc. 82-1, Davis Aff.,¶ 8). During that time, Davis developed experience estimating the cost to perform crane maintenance, which included estimating the number of man-hours [and man lifts] necessary to complete the work. (Doc. 82-1, Davis Aff.,¶ 8). As a result, to survive summary judgment, Konecranes must provide some evidence that Davis's thoughts about the number of man-hours and man lifts needed for the 7501 and 7502 cranes were based on Konecranes' Confidential

Information, and not based on his own industry experience separate from Konecranes. Konecranes has utterly failed to do so.

Fourth, and perhaps most significantly, ICS was the subcontractor that performed all of the work on the 7500 and 7503 cranes with which Davis was involved as a Konecranes employee. (Doc. 82-1, Davis Aff.,¶ 5; Doc. 75-6, Groomes June 26, 2012 email to ICS, p. 2). As a result, even if the number of man-hours and man lifts needed for the 7500 and 7503 crane projects were Konecranes' "Confidential Information" (and they are not), and even if there were some evidence that Davis disclosed to ICS the number of man-hours and man lifts that were used on those (2) projects (and Davis did not), ICS already knew those numbers because ICS quoted, performed, and billed for all the work on those two (2) projects. (Doc. 82-1, Davis Aff.,¶ 6). As a matter of law and common sense, a party to a confidentiality agreement cannot be liable for damages resulting from an alleged breach of that agreement through a disclosure of information to a third-party that (1) already knows the information and (2) was the original source of the information. For each of these reasons and for all of them, Konecranes has failed to identify a genuine issue of material fact, and the Court should enter summary judgment in favor of Davis and ICS on Konecranes' claim for breach of the Agreement.

B. Even if Konecranes could establish that Davis breached a fiduciary duty to Konecranes (and it cannot), Konecranes has produced no evidence that Konecranes suffered any damage as a result.

In its response to Defendants' summary judgment motion, Konecranes asserts that Davis breached a fiduciary duty he owed to Konecranes in three (3) respects. First, Davis allegedly failed to provide a Nucor purchase order to Konecranes, and

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Konecranes claims it did not know about that purchase order until Nucor cancelled it on July 25, 2012. (Doc. 80, p. 8). However, even if Konecranes could show that Davis failed to provide the purchase order to Konecranes—an allegation Davis denies—Konecranes has adduced no evidence as to how or why that damaged Konecranes. Specifically, Konecranes has produced no evidence as to what Konecranes would or could have done—if it had known about the purchase order—to cause the work described on that purchase order to be awarded to Konecranes.[2] In the absence of any such evidence, the Court should grant summary judgment to Davis and ICS.

Second, Davis testified that he did not tell Konecranes that ICS became a direct vendor to Nucor, a fact that Davis learned in late March or early April 2012. (Doc. 80-3, p. 32, l. 8-10). Even if that rose to the level of a breach of fiduciary duty (and it should not), Konecranes has produced no evidence showing how or why that damaged Konecranes. Specifically, Konecranes has marshalled no evidence as to what Konecranes would or could have done—if it had known in late March or early April that Nucor had a direct relationship with ICS—to cause the work described on the subject purchase orders to be awarded to Konecranes. In the absence of any such evidence, the Court should grant summary judgment to Davis and ICS.

Third, Konecranes alleges that Davis was unable "to provide Konecranes information and files from his computer before leaving to join ICS." (Doc. 80, p. 15). It is undisputed that, upon departing Konecranes, Davis turned in his laptop. (Doc. 75-1, Davis Aff., ¶15). Konecranes contends that Davis told Konecranes that a virus prevented Davis from retrieving any files or information. (Doc. 80-4, Villas Aff., ¶8).

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[2] Konecranes asserts that it did not know about Purchase Order #551180 until Nucor faxed its notice of cancellation. (Doc. 80, p 8). Significantly, Konecranes does not assert that it was unaware of Purchase Order #549662, which was cancelled by Nucor at the same time as Purchase Order #551180. If Konecranes knew of Purchase Order #549662 but was unable to prevent Nucor from cancelling it, how could Konecranes have prevented Nucor from canceling Purchase Order #551180? (Doc. 75-4, p. 1-2).

Regardless, there is no evidence that Davis deleted any information from that laptop, or that anything relating to Davis's use of that laptop caused any damage to Konecranes.[3] In the absence of any such evidence, summary judgment should be granted to Davis and ICS.

C. There is no evidence that any misconduct by Davis caused Konecranes to lose any work that Konecranes otherwise would have won and performed.

In their opening Memorandum, Davis and ICS show that there is no evidence that Davis's alleged misconduct caused Konecranes to lose work that Konecranes otherwise would have won and performed, and as a result, Davis and ICS are entitled to summary judgment on both of Konecranes' claims. In response, Konecranes asserts that "Davis [. . .] caused Nucor to cancel purchase orders to Konecranes a little over two months after leaving Konecranes for ICS." (Doc. 80, pp. 12-13). However, Konecranes has designated no admissible evidence showing that any unlawful conduct by Davis or ICS caused Nucor to cancel the purchase orders. The only evidence that Konecranes has presented to the Court as to why Nucor cancelled those purchase orders is that Nucor "changed the time for this work, so the projects needed to be rebid." (Doc. 80-5, ¶ 24).[4] But that begs the question: what caused Nucor to change the time for the work? At the summary judgment stage, Konecranes bears the burden to produce admissible evidence that Nucor changed the time for the work as the result of some unlawful conduct by Davis or ICS. *See Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 293 (7th Cir.1996) (affirming summary judgment because the plaintiff could not establish the "critical element of causation"); *Shepard v. State Auto Mut. Ins. Co.*, 463 F.3d 742, 748-49 (7th Cir. 2006) (affirming summary judgment on the element of "causation" because the plaintiff had not produced evidence sufficient evidence to allow a jury to reach a factual conclusion without speculation). In the absence of any such evidence, Davis and ICS are entitled to summary judgment.

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[3] Perhaps most significantly, there is no evidence as to the efforts Konecranes made, upon receiving the laptop from Davis, to retrieve information from the laptop, and the success of those efforts.

[4] This is in accord with the statements on the cancelled purchase orders themselves. *See* Doc. 75-4, p. 1-2 ("cancelled . . . as job was for spring outage and not done. Job is being requoted.")

Konecranes contends that it did not have the opportunity to rebid the cancelled purchase orders "because ICS had been onsite at Nucor for three months and that Nucor would be contracting directly with ICS." (Doc. 80-5, Groomes Aff., ¶26). But that begs a second question: why had been ICS onsite at Nucor for three (3) months? Again, at the summary judgment stage, Konecranes bears the burden to produce admissible evidence that ICS was onsite because Davis and ICS had engaged in some unlawful conduct. Konecranes has produced none. Instead, the evidence shows that ICS had been onsite because Nucor wanted ICS onsite, for two (2) reasons. First, Nucor liked ICS's work. As Groomes told ICS on June 26, 2012, "[Nucor] will not have anyone else weld on their cranes," and that Nucor "want[ed] [ICS] or nobody." (Ex. 6, p. 2). Second, as Groomes stated in his July 25, 2012 email to Jason Villas, "[Nucor] do[es] not want Konecranes to be the in between company anymore." (Ex. 5, p. 1). Absent evidence that some unlawful conduct by Davis and ICS led Nucor to contract directly with ICS, the Court should enter summary judgment in favor of Davis and ICS.

D. Summary judgment should be granted because none of the issues of fact identified by Konecranes are material to the outcome of the case.

In order to preclude entry of summary judgment, an issue of fact must be "material," *i.e.*, one that "might affect the outcome of the suit under the governing law." *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In its response, Konecranes designates evidence that shows the parties have different recollections of the circumstances surrounding Davis's termination, but none of those issues of fact affect the outcome of Konecranes' claims in this case. For the purposes of Konecranes' specific breach of contract and breach of fiduciary duty claims, it does not matter whether Konecranes fired Davis, or whether Davis quit. It does not matter whether Davis told Konecranes he was going to work for ICS in management, or sales. It does not matter whether Konecranes terminated Davis's access to the laptop, or whether a virus was the culprit. None of those issues of fact are material to Konecranes' claims.

III. CONCLUSION

For each of the foregoing reasons and for all of them, the Court should enter full and final summary judgment in favor of Davis and ICS in this action.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2014, a copy of the foregoing *Reply Memorandum in Support of Defendants' Motion for Summary Judgment* was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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